IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DOMINIQUE DEWAYNE GULLEY-FERNANDEZ,

Plaintiff,

v.

EDWARD WALL, *et al.*,

Defendants.

OPINION AND ORDER

15-cv-133-wmc

Plaintiff Dominique DeWayne Gulley-Fernandez is biologically male but identifies as female.[1] She is currently incarcerated by the Wisconsin Department of Corrections ("WDOC") and has filed this proposed action under 42 U.S.C. § 1983, alleging mistreatment related to her mental health needs and Gender Identity Disorder ("GID"). Gulley-Fernandez has already been found eligible to proceed *in forma pauperis,* and she has made an initial, partial payment of the filing fee. 28 U.S.C. § 1915(b). Since plaintiff is incarcerated, the court must also screen her complaint and dismiss any portions that are frivolous, malicious, fail to state a claim on which relief may be granted or seek money damages from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A.[2]

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[1] At times, Gulley-Fernandez has also been known as Alejandro Puig Fernandez-Smollett, Dominique Wayne Gulley, Dominique Kelondre Gulley, Dominique Treymaine Gulley and Chimera Ahamad Razeak.

[2] Because Gulley-Fernandez filed an amended complaint on June 8, 2015, the court will consider the amended complaint to be operative for purposes of its screening review. *See* Fed. R. Civ. P. 15(a).

In addressing any *pro se* litigant's complaint, the court must read the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Under this lenient review, plaintiff's Eighth Amendment and state law claims may proceed against certain defendants, but she may not proceed with her Americans with Disabilities Act ("ADA") and Rehabilitation Act claims.

ALLEGATIONS OF FACT[3]

Gulley-Fernandez has been confined at the Wisconsin Secure Program Facility ("WSPF") in Boscobel since March of 2011. For all times relevant to this lawsuit, Edward Wall was the secretary of the WDOC; Mark Heise is the Director of the Bureau of Classification and Movement; Tracy Johnson and T. Sebranek are licensed psychologists; Burton Cox is a medical doctor; Catherine Morrison is an offender classification specialist; Captain David Gardner is the "acting security director"; Cathy Jess is WSPF's administrator of the WDOC Division of Adult Institutions; and Gary A. Boughton is the warden of WSPF.

Gulley-Fernandez is gay and anatomically male, but identifies as a female and dresses as a woman. From 2003 to 2008, before her incarceration, she took female hormone, birth control and estrogen pills. She has also been diagnosed with "ADHD, DCD, bipolar, PTSD, anxiety, Gender Identity Disorder, and Anti-Social Personality disorder." (Am. Compl. at 3, dkt. #13.) Since transferring to WSPF, Gulley-Fernandez

[3] For purposes of this order, the court accepts all well-pled allegations as true and assumes the following probative facts.

has tried to continue receiving medications prescribed to treat GID, but her medical doctor, Cox, and her psychologists, Drs. Johnson and Sebranek, have not approved the medication. Additionally, Dr. Cox has not responded to her request for a sex reassignment surgery, and Dr. Sebranek and Dr. Johnson have told her that she does not suffer from PTSD, GID or bipolar disorder.

Gulley-Fernandez also wrote Captain Gardner five letters describing both her treatment and medication needs, as well as requesting sex reassignment surgery. She has received no response to these letters either. Gulley-Fernandez also sought relief through administrative remedies by writing to WSPF administrative security personal (Jess, Heise and Wall), but they similarly did not help her.

OPINION

Plaintiff claims that defendants violated her rights under the Eighth Amendment, the ADA, the Rehabilitation Act and state law. Although she does not state the relief she seeks, plaintiff seeks a temporary restraining order and preliminary injunction, as well as compensatory and punitive damages. Plaintiff's requests for a temporary restraining order and preliminary injunction appear in a section of the form complaint she filled out, but she did not comply with the procedures found in Fed. R. Civ. P. 65 or this Court's Procedure to be Followed on Motions for Injunctive Relief. A copy of those procedures is being provided to plaintiff with this Order, but at this stage her motion will be denied without prejudice to her re-filing in accordance to these procedures.

I. Eighth Amendment Claim

Plaintiff alleges that all of the defendants were deliberately indifferent to her treatment needs in violation of the Eighth Amendment. A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment when his conduct demonstrates deliberate indifference to a prisoner's serious medical or mental health care needs, thereby constituting an "unnecessary and wanton infliction of pain." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)); *see Belbachir v. County of McHenry*, 726 F.3d 975, 980 (7th Cir. 2013); *Rice ex. rel Rice v. Corr. Med. Servs.*, 675 F.3d 650, 665 (7th Cir. 2012).

A serious medical need may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. *Johnson v. Snyder*, 444 F.3d 579, 584-85 (7th Cir. 2006). The Seventh Circuit and several other courts have considered GID or transsexualism a "serious medical need" for the purposes of the Eighth Amendment. *See De'Lonta v. Johnson*, 708 F.3d 520, 522 (7th Cir. 2013); *Fields v. Smith*, 653 F.3d 550, 554 (7th Cir. 2011); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001); *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792 (E.D. Wis. 1990)).

To state a deliberate indifference claim, the plaintiff must also allege that prison officials knew about her serious medical need and did nothing with a "sufficiently culpable state of mind." *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1970) (internal quotation marks

omitted). Here, plaintiff alleges that her psychologists, Drs. Johnson and Sebranek, failed to continue providing medication needed to treat her GID, and Dr. Cox also ignored her request for medication, as well as her request for a sex reassignment operation. These allegations are sufficient to state a claim that these defendants were aware of plaintiff's serious medical needs but consciously disregarded them. Likewise, plaintiff's allegation that she wrote to Captain Gardner repeatedly requesting GID medications and sex reassignment surgery, permit an inference that Gardner knew about plaintiff's needs and ignored them.[4] Accordingly, plaintiff may proceed with her deliberate indifference claim against defendants Johnson, Sebranek, Cox and Gardner.

Plaintiff may not, however, proceed with her deliberate indifference claims against the remaining defendants. Individual liability under § 1983 requires "personal involvement." *See Smith v. Bray*, 681 F.3d 888, 899 (7th Cir. 2012) ("[I]ndividual liability under § 1983 is appropriate where the 'individual defendant caused or participated in a constitutional deprivation.'") (quoting *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1039 (7th Cir. 2003)). Plaintiff alleges that although she attempted to obtain relief through informal administrative remedies, Catherine Jess, Mark Heise and Edward Wall were "not helping," but she includes no specific facts about each of their personal involvement. Moreover, since each of these defendants work in supervisory positions -- Jess as the DAI Administrator, Heise as the Director of Bureau of Classification and Movement and Wall as the Secretary of the DOC -- they are entitled

[4] Of course, Captain Gardner may be able to show that he relied in good faith on the medical and psychological expertise of the other defendants, but the court will not anticipate this defense at the pleading stage.

to delegate the treatment of prisoners to health care personnel. The ability to delegate means that their failure to intervene in treatment decisions does not violate the Eighth Amendment. *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009). If a prisoner does not allege facts showing that he contacted supervisory officials whose job responsibilities make them liable for his alleged mistreatment, he fails to establish supervisory liability. *See id.* ("Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job."). Because plaintiff has not included any specific allegations as to Jess, Heise and Wall, she has failed to state a claim against them under the Eighth Amendment.

Similarly, the amended complaint names Gary Boughton, the WSPF warden, and Catherine Morrison, the WSPF classification specialist, but plaintiff includes no specific allegations about their personal involvement in her treatment. As she fails to allege that these defendants were somehow personally involved in her treatment, knew about plaintiff's serious medical needs *and* did nothing, the claims against them cannot proceed.

II. Americans with Disabilities Act and Rehabilitation Act Claims

Title II of the ADA provides that qualified individuals with disabilities may not "by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity." 42 U.S.C. § 12132. This provision of the ADA applies to state prisons. *Penn. Dep't of Corr. Yeskey*, 524 U.S. 206-09 (1998). The Rehabilitation Act is substantially identical, providing that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be

subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A claim under § 504 of the Act has four elements: (1) an individual with a disability; (2) who was otherwise qualified to participate; (3) but who was denied access solely by reason of disability; (4) in a program or activity receiving federal financial assistance. *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 671 (7th Cir. 2012).

The proper defendant for claims under the ADA and the Rehabilitation Act is generally the relevant state agency or its director in his official capacity. *See* 42 U.S.C. § 12131(1)(b); *Jaros*, 684 F. 3d at 670 n.2 (noting that because individual capacity claims are not available, the proper defendant is the agency or its director in his official capacity). Accordingly, the plaintiff may not proceed against any of the defendants under the ADA or Rehabilitation Act in their individual capacities. Unfortunately, neither may plaintiff proceed against defendants in their official capacity because GID is specifically excluded as a disability under the ADA and Rehabilitation Act. *See* 29 U.S.C. § 705(20(F) ("Disability does not include … gender identity disorders not resulting from physical impairments"); 42 U.S.C. § 12211 ("the term 'disability' shall not include … gender identity disorders not resulting from physical impairments"). Moreover, although plaintiff does allege that she suffers from ADHD, DCD, bipolar disorder, PTSD, anxiety and anti-social personality disorder, her claims expressly arise only from the denial of treatment for GID. Finally, even if plaintiff qualified as disabled due to her other mental health problems, this claim may not proceed because she has not alleged that she was denied treatment because of that disability. *See Barrett v. Wallace*, 570 Fed. Appx. 598,

600 (7th Cir. 2014) (plaintiff had no ADA claim where his claims related to the failure to properly treat mental health issues and he did not allege denial of treatment *because of* his mental illness).

III. State Law Claims

Plaintiff also brings state law claims for medical malpractice and negligence. The exercise of supplemental jurisdiction is appropriate when the state law claims are "so related" to the federal claims that "they form part of the same case or controversy." 28 U.S.C. § 1367(a). Here, plaintiff's medical malpractice and negligence claims also arise from the defendants' alleged failure to respond to her requests for GID treatment and share the same set of facts as her Eighth Amendment claims. Accordingly, the court will allow her to proceed with her state law claims, but only against certain defendants.

To prevail on a claim for medical malpractice or negligence in Wisconsin, a plaintiff must prove the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) injury or injuries, or damages. *Paul v. Skemp*, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (2001) (*citing Nieuwendorp v. Am. Family Ins. Co.*, 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995)). Therefore, every claim for medical malpractice and negligence requires a negligent act or omission that causes an injury. *Id.* Based on plaintiff's allegations that these defendants completely ignored her requests for treatment or transfer, it is reasonable to infer at this stage that they were negligent. Plaintiff may, therefore, proceed with her medical malpractice and negligence claims against Johnson, Sebranek and Cox.

However, the court can discern no comparable state claim against Gardner, who as security director, at most was deliberately indifferent to the medical defendants' apparent failure to treat the plaintiff, a claim that sounds under the Eighth Amendment, not common law tort, and certainly not out of *medical* malpractice. Accordingly, the court declines to exercise supplemental jurisdiction over the negligence and medical malpractice claims against Gardner, as well as Wall, Jess, Heise, Wall, Boughton and Morrison. In determining whether to decline to exercise supplemental jurisdiction over state law claims, "a district court should consider and weigh the factors of judicial economy, convenience, fairness and comity in deciding whether to exercise jurisdiction over pendent state-law claims." *Wright v. Associated Ins. Companies Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994). As all of the federal claims against the latter defendants have been dismissed (other than Gardner), it would be a waste of judicial resources to require those defendants to respond only to state law claims.

IV. Next Step

While Gulley-Fernandez's allegations against defendants Johnson, Sebranek and Cox and Gardner pass muster under the court's lower standard for screening, she should be aware that to be successful on her claim, she will have to prove defendants' deliberate indifference, which is a high standard. Inadvertent error, negligence or gross negligence are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). In particular, it will be Gulley-Fernandez's burden to prove: (1) her medical conditions constituted serious medical needs, which may well require expert testimony rebutting medical evidence to the contrary; and (2) perhaps even more

daunting, that the defendants knew her condition was serious and deliberately ignored her condition and related pain.

ORDER

IT IS ORDERED that:

1. Plaintiff Dominique DeWayne Gulley-Fernandez is GRANTED leave to proceed on her claims of inadequate treatment for her GID against: (a) Dr. Johnson, Dr. Sebranek, Dr. Cox and Captain Gardner for violating the Eighth Amendment; and (b) Johnson, Sebranek and Cox for violation of state malpractice and negligence law.

2. Plaintiff is DENIED leave to proceed on all other claims. Defendants Edward Wall, Mark Heise, Catherine Jess, Catherine Morrison and Gary Boughton are DISMISSED.

3. For the time being, plaintiff must send defendants a copy of every paper or document she files with the court. Once plaintiff has learned what lawyer will be representing defendants, she should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that she has sent a copy to defendants or to the defendants' attorney.

4. Plaintiff should keep a copy of all documents for her own files. If plaintiff does not have access to a photocopy machine, she may send out identical handwritten or typed copies of her documents.

5. Pursuant to an informal agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendant.

6. If plaintiff is transferred or released while this case is pending, it is her obligation to inform the court of her new address. If she fails to do this and defendants or the court are unable to locate him, her case may be dismissed for failure to prosecute.

7. Plaintiff's motion for summary judgment (dkt. #14) is DENIED without prejudice.

Entered this 29th day of December, 2016.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge